No. 80-1312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD G. ELBERT,

Petitioner,

vs.

THE BOARD OF EDUCATION OF LANARK COMMUNITY UNIT SCHOOL DISTRICT #306, CARROLL COUNTY, ILLINOIS, DENNIS STURTEVANT, VERNON VOSS, MARY HOLESINGER, and BETTYE ZIER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question presented is whether a governmental employee, allegedly defamed in the course of an attempt to terminate his employment, yet who was never deprived of continuous employment or any other right, claim or expectation, has stated a claim for a deprivation of a liberty interest under 42 U.S.C. § 1983.

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STATEMENT OF THE CASE

(a) Proceedings Below

On November 21, 1978, District Court Judge Marovitz entered a written memorandum opinion granting Defendant's Motion to Dismiss Counts I and II, and Summary Judgment as to Count III based on seven affidavits, four

depositions and other supporting documents which were thoroughly considered by the trial court. (Petitioner's Writ of Certiorari, Appendix D at 23a). Subsequent thereto Plaintiff filed a Motion for an Amendment to and Relief from the Memorandum Opinion of November 21, 1978. On February 13, 1979, a Memorandum Opinion was entered reinstating Count III of the second amended complaint. Plaintiff filed notice of appeal only as to Counts I and II on September 10, 1980. The Seventh Circuit affirmed the dismissals. Elbert v. Board of Education of Lanark et al., 630 F.2d 509 (7th Cir. 1980). A petition for a rehearing *in banc* was denied on November 7, 1980.

(b) Statement of the Facts

The Petitioner, Donald G. Elbert was first employed as Superintendent of the Lanark Community Unit School District in July 1974. He executed a contract for a two year term.[1] (Def. App. at 1).

On February 24, 1976, the Respondent Board of Education, during a public meeting, convened in "closed session" pursuant to the Public Meetings Act, *Ill. Rev. Stat.*, ch. 102, § 42, to consider information regarding the reemployment or dismissal of the Superintendent (Sturtevant Deposition at 6) (Kniss Deposition at 6) (Pl. App. at 20a, Count I, Paragraph 6). At that meeting a decision was first made not to renew the Superintendent's contract. On March 8, 1976, the Board

[1] *The School Code* requires that if a Superintendent is extended a multi-year contract the contract term shall be no less than or more than a three year term (multi-year contract) except for a person serving as a Superintendent for the first time in Illinois. In consideration of a multi-year contract the Superintendent waives teacher tenure rights. *Ill. Rev. Stat.*, ch. 122, § 10-23.8.

of Education voted at a public meeting in "open session" not to renew the Superintendent's employment contract (Pl. App. at 20a, Count I, Paragraph 7). On March 9, 1976, the Board of Education tendered the Superintendent written notice of intent not to renew the contract. (Pl. App. at 21a, Count I, Paragraph 8, Def. App. at 7). On March 16, 1976, the Superintendent requested a hearing.[2] (Def. App. at 8).

On March 24, 1976, the Board of Education during a public meeting attempted to schedule a dismissal hearing but because of the unavailability of the Petitioner's and the Respondents' counsel, no action was taken. (Kniss Deposition at 8; Sturtevant Deposition at 9). At the March 24 meeting, the Board again voted in public session to dismiss the Superintendent at the conclusion of the existing contract term. The following reasons were cited by the Board for this action:

"1. Late in filing financial and state reports; also, late in ordering supplies.
2. Does not have current financial reports available.
3. Exhibits a lack of understanding of school finances.
4. Failure to carry out Board policy.
5. Failure to carry out Board directives.
6. Hiring personnel without Board approval.
7. Inability to work with non-certified personnel.
8. Using school personnel for personal business.
9. Modifying minutes of the Board meetings taken by recording secretary.
10. Misuse of public funds.

---

[2] *The School Code* provides that "[w]ithin 10 days after receipt of such notice of intent not to renew a contract, the Superintendent may request a closed session hearing on the dismissal." *Ill. Rev. Stat.*, ch. 122, § 10-23.8.

11. Attempting to have the Board sign a tax levy which was incomplete.

(Pl. App. 21-22a, Count I, Paragraph 11; Def. App. at 9). Written Notice was again given to the Superintendent of the Board's intent not to renew his contract. (Pl. App. at 22a, Count I, Paragraph 12).

On March 30, 1976, the Superintendent submitted a written request to each Board member for an audit with respect to the charge of "misuse of public funds." (Pl. App. at 22a-23a, Count I, Paragraph 15, Def. App. at 10). The Superintendent also requested a hearing and asked that it be held during the week of April 5-9, 1976. (Pl. App. at 22a, Count I, Paragraph 13).

On April 1, 1976, counsel for the Superintendent submitted a written request for a Bill of Particulars on the dismissal charges. (Pl. App. at 23a, Paragraph 16; Def. App. at 11). On April 5, 1976, a special meeting of the Board of Education was held at which time the Superintendent's request for an audit was granted on the condition that he pay for it. (Pl. App. at 23a, Count I, Paragraph 17). On April 6, 1976, Board members Mary Holesinger and Bettye Zier met with the Board's attorney to prepare a Bill of Particulars pursuant to the Superintendent's request. (Pl. App. at 23a, Count I, Paragraph 19). (Deposition of Keith Kniss at 10). The Bill of Particulars listed, with respect to the charge of "misuse of public funds", the following actions:

a. Improperly using the working cash fund and the safety code fund to increase the monies in the educational fund.

b. Hiring non-certified personnel for the district without any approval by the Board and without any contract and contrary to law.

c. Sending a school district employee to Rockford to pick up his son.

d. Making a personal telephone call or personal telephone calls which were charged to the district and then reimbursing the district for some or all of said calls." (Def. App. at 14).

On April 7, 1976, the Superintendent received the Bill of Particulars.

On or about April 8, 1976, Mary Holesinger communicated with board member Keith Kniss stating:

> Since you were unable to come to [the Board's attorney] Mr. Leeman's office Tuesday afternoon, I'm sending you a copy of the Bill of Particulars.
>
> As it appears now *we will not be able to have a hearing the 8th or 9th because of Mr. Elbert's lawyer*, therefore our lawyer said it is all right to have this presented and it will be before the election.
>
> I pointed to the Carroll County [Review (the local newspaper)] Mr. Trosley, that you and Wilson [the Board president] had not seen these and they will be presented without your approval or disapproval" (Pl. App. at 23a, Count I, Paragraph 20) (Kniss Deposition at 11) (Def. App. at 15). (Emphasis added).

On April 8, 1976, the Bill of Particulars was published in the *Carroll County Review* (Pl. App. at 23a, Count I, Paragraph 20).

On April 10, 1976, the School Board Election was held. The Respondent Board members, Bettye Zier and Mary Holesinger, were not reelected to office. Respondent Board members, Vernon Voss and Dennis Sturtevant, were reelected. Three new Board members were elected. (Pl. App. 24a, Count I, Paragraph 22). The change in membership of the School Board resulted in a reconsideration of the dismissal of Superintendent Elbert. "Closed sessions" were held during public meetings on April 19, 20, and 28, 1976 to discuss the ter-

minations with the new members of the Board. (Pl. App. at 24a, Count I, Paragraph 24).

On May 3, 1976, a special meeting was held "in closed session" between the Superintendent and the new members of the Board. At that meeting, the Superintendent voluntarily, without counsel, responded to each of the charges published by the Board. (Pl. App. at 25a, Count I, Paragraph 25). On May 10, 1976, at a scheduled public meeting the Board publicly exonerated the Superintendent and offered him a new one year contract. The Board minutes of that meeting provide as follows:

> "Resolved that Donald G. Elbert be employed by this Board of Education as Superintendent of Lanark Community Unit School District No. 305, Carroll County, Illinois for the fiscal year commencing July 1, 1976 and terminating June 30, 1977, and that it be further resolved that Wilson Fisher, President of the Board of Education, and Robert W. Castendyck, Attorney for the Board be directed to prepare a form of contract for the Board's approval. Motion seconded by Gillfillan.
>
> "Fisher read the following statement to be recorded in the minutes as part of the discussion. Concerning the employment of Donald G. Elbert the Board has met in several executive sessions as a Board alone, with Mr. Elbert and with our School attorney, Mr. Robert Castendyck. Each and every reason listed for the termination of the contract with Mr. Elbert was discussed in depth. The evaluation report of April 7, 1976, from the Investigating Team of the Illinois Association of School Administrators was also reviewed.
>
> Now, after thorough consideration of the reasons given for the termination of the current contract with Donald G. Elbert, the majority of the Board of Education of the Lanark Community Unit Schools, District No. 305 affirms the following conclusions:

1. That some errors of judgment were made by Mr. Elbert in the performance of his assignment as Superintendent of the Lanark Schools.
2. That some errors of judgment were made by the Board of Education both collectively and individually in the performance of their responsibility as elected school officials.
3. That at no time did Mr. Elbert misuse public funds or personally profit or benefit from any act or decision made in the performance of his assignment as Superintendent.
4. That there is insufficient evidence in fact to warrant the termination of the contract with Mr. Elbert as Superintendent.

Voting yes: Fisher, Gillfillan, Kniss, Kruse and Rath. Voting no: Sturtevant and Voss. Motion carried." (Def. App. at 16, 17, 18).

The decision and the statements relating to the Bill of Particulars were reported verbatim in the local newspapers. Elbert expressed satisfaction with the exoneration. (Kniss Deposition at 47). The Superintendent accepted the contract of employment and was continuously employed by the school district.

On January 17, 1977, the Board passed the following resolution:

> "CONTRACTS—SUPERINTENDENT, PRINCIPAL:
> Motion by Kniss, seconded by Rath that the contract of Superintendent Donald Elbert be extended until June 30, 1978 at a salary to be determined later. Voting yes: Fisher, Kniss, Knutti, Kruse, Rath. Voting no: Sturtevant. Motion carried." (Def. App. at 19, 20).

The Superintendent accepted reemployment for the 1977-78 academic year. He remained employed until the effective date of his voluntary resignation on June 30, 1978, which was submitted on February 27, 1978. (Def. App. at 21).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1.

UNDER *PAUL v. DAVIS*, A GOVERNMENTAL EMPLOYEE, ABSENT A LOSS OF SOME CLAIM, ENTITLEMENT, OR EXPECTATION, MAY NOT COMMENCE AN ACTION UNDER 42 U.S.C. § 1983, FOR THE DEPRIVATION OF A LIBERTY INTEREST.

Certiorari should be denied. This Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976), is dispositive. Petitioner was never deprived of continuous employment as the superintendent of the school district nor was he deprived of any other claim, entitlement or expectation. Assuming *arguendo*, that the public pronouncements of the school board damaged *per se* the reputation, honor or integrity of the Petitioner, no cause of action arises under 42 U.S.C. § 1983 for mere defamation.

This Court "has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise was sufficient to invok the guarantees of procedural due process *absent an accompanying loss of government employment.*" 424 U.S. at 706 (emphasis added).

This Court, in analyzing the development of the liberty and property interests which trigger due process rights, stated:

> "In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of

> the Fourteenth Amendment. But the interest in *reputation alone* which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of tort law, providing a forum for vindication of those interests by means of damage actions." 424 U.S. at 711-712. (Emphasis added).

No status governmentally enjoyed by the petitioner was distinctly altered or extinguished.

The petitioner argues that the petition for a writ of certiorari should be granted so that "this Court can eliminate highly prejudicial confusion concerning the impact of *Paul v. Davis*, . . ." No such confusion or prejudice reigns! This Court specifically rejected the germination of litigation premised in the Due Process Clause *ex proprio vigore*, *id.* 424 U.S. at 701. The petitioner suggests that the facts in *Paul v. Davis*, are strikingly dissimilar from the facts in the present case. The strikingly similar facts here are that the petitioner had *never* been deprived of continuous employment or of any other governmental right, claim or expectation. Petitioner has not been prejudiced. Here, as in *Paul*, Petitioner had available a state defamation claim.

The petitioner apparently argues that "eight specific illegal actions" alleged in the amended complaint warrant the conclusion that a claim has been stated under 42 U.S.C. § 1983. Singularly or collectively the eight acts do not arise to invoke the protection afforded by the Due Process Clause. Petitioner argues that the alleged facts must be assumed to be true. However,

affidavits, depositions and other documents were submitted in a motion to dismiss pursuant to F.R.Civ.P. 12(b)(6). The evidence submitted was not contradicted.

An analysis of the eight specific illegal acts alleged is required (Petitioner's brief at 12-13). In Paragraphs 1 and 7 Petitioner asserts that the Board engaged in "secret meetings." The meetings of public bodies in Illinois are governed by the Meetings Act. *Ill. Rev. Stat.*, ch. 102, § 41, *et seq.* It provides generally that meetings be held in public. However, the statute sets forth specific exceptions, to wit:

> "This section does not prevent any body covered by this Act from holding *closed sessions* to consider the appointment, employment or *dismissal* of an employee . . ." *Ill. Rev. Stat.*, ch. 102, § 42 (emphasis added).

Hence, closed sessions were held in accordance with state law, and involved no action that was either improperly "secret" or harmful to Petitioner's reputation.

In Paragraphs 2 and 3 Petitioner asserts that the Board "refused to grant hearings requested." Scheduling a hearing date was complicated by the unavailability of Petitioner's counsel. (Kniss Deposition 8, Sturtevant Deposition 9). The Board attempted to arrange a mutually convenient date, but a date was not available until after the board election. (Def. App. at 15). Moreover, it must be noted that 63 days after the public decision of the Board not to renew the Superintendent's contract (March 8, 1976) the Board exonerated the Petitioner and offered to extend his contract which he accepted. It is relevant to note that during this interim period, a notice of intent not to renew the contract was served on the Petitioner, notice of charges were adopted, and pursuant to the request of the Superintendent's

attorney, a Bill of Particulars was prepared. These steps were taken in anticipation of a public hearing. The record belies the allegation that the Board refused to grant the hearing requested.

In Paragraphs 4, 5 and 6 Petitioner asserts that the stigmatizing conduct damaged the Petitioner's reputation. Defamation alone does not invoke the procedural rights afforded by the Due Process Clause.

Finally, in Paragraph 8 Petitioner asserts that he was harmed by the statement that he had made "errors of judgment." Petitioner's position that this language concerning common human characteristics is seriously stigmatizing is hyperbole which does not warrant further discussion. In summary, it is clear that the eight acts of the Respondents, allegedly designed to "ruin" the Petitioner, even when viewed collectively, fall short of anything more than mere defamation. Nowhere in Petitioner's Second Amended Complaint is it asserted that these specific allegations are false, *Codd v. Velger*, 429 U.S. 624 (1977).

Petitioner seeks to recover damages for mental anguish and loss of job opportunities caused by the alleged actions of the Board of Education. Petitioner's complaint sounds in tort. No deprivation of interest giving rise to Fourteenth Amendment rights is involved, nor is there a concomitant right to institute action under § 1983 of the Civil Rights Act of 1871.

Petitioner argues that he was denied due process prior to public pronouncement of the Respondent's notice of intent not to renew his contract. Petitioner's contract was for a two year term. The *Illinois School Code* requires that a Board of Education give notice of its intent not to renew the contract prior to April 1 of the year in which it expires. Such notice was served on the

petitioner. Notice does *not* terminate the contractual relationship. A hearing may then be requested by the superintendent. Upon completion of the hearing the Board of Education may *then* terminate. *Ill. Rev. Stat.*, ch. 122, § 10-23.8.

The crucial issue is not whether the hearing was held prior to public pronouncement, but whether it was held prior to termination. *See, Arnett v. Kennedy*, 416 U.S. 134 (1974); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Barszcz v. Board of Trustees of Community College District No. 504*, 400 F. Supp. 675 (N.D. Ill. 1975) aff'd 539 F.2d 715 (7th Cir. 1975). *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975), cert. dismissed as improvidently granted 425 U.S. 560 (1975). Petitioner was not terminated.

Petitioner argues he was deprived of substantive due process. Petitioner cites *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), to stand for the proposition that the Board was biased, prejudiced and lacked the necessary impartiality to render a fair disposition. Ironically, Petitioner argues that the Board had prejudged the matter and had officially voted to terminate. Here, the Board's public notice of termination was required prior to termination pursuant to *The School Code, Ill. Rev. Stat.*, ch. 122, § 10-23.8. Compliance with state law does not warrant the conclusion that the Board was biased. Here, the Petitioner's employment was continued—not terminated. Such action in complying with the statutory notice requirements does not constitute evidence that the Board was prejudiced against him. *See, Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976). Furthermore, *Hostrop* is inapplicable because (1) Hostrop was a College President not subject to the dismissal procedure of *The*

School Code; (2) he was *terminated* from employment; (3) and he was *never reinstated* as an employee of the college. Petitioner argues that the Board refused to grant him a public hearing resulting in a deprivation of due process. (See Petitioner's brief at 15). Here, Notice of Charges were served; at the request of Petitioner's counsel, a Bill of Particulars was furnished, and a hearing would have been scheduled but for the unavailability of the attorneys involved.

On May 10, 1976, the Board rehired Petitioner and publicly issued its conclusions which were favorable to Petitioner and fully reported by the local press. The objective of a due process hearing was achieved. Petitioner's contract was extended and he was publicly cleared of all charges. These uncontested facts compel the conclusion that sufficient and timely process was afforded.

The Petitioner suggests that the instant cause falls squarely within the parameters of *Board of Regents v. Roth*, 408 U.S. 564 (1972) (Petitioner's brief at 13-14). Yet in *Paul v. Davis*, 424 U.S. 693 (1976), this Court declared:

> "Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the state in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee." 424 U.S. at 710.

Hence, Petitioner's liberty interest has not been infringed.

2.

THE DECISIONS OF THE SEVENTH CIRCUIT ARE CONSISTENT WITH *PAUL v. DAVIS*.

The Seventh Circuit has consistently applied the teachings of *Paul v. Davis*. In *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976) cert. denied, 430 U.S. 960 (1977) the mandate of *Paul* was interpreted as follows:

> . . . infliction of a stigma to reputation accompanied by a failure to rehire (or *a fortiori*, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. Moreover, this combination of *stigma plus* failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment, 542 F.2d at 973. (Emphasis added).

In *Colaizzi*, the discharge of an employee and the simultaneous public accusation against the employee charging that he had taken money constituted the "stigma plus" entitling the employee to a due process hearing.

The dismissal and alleged contemporaneous public accusation that a discharged teacher had taken indecent liberties with female students constituted "stigma plus" compelling a due process hearing. *Austin v. Board of Education*, 562 F.2d 446 (7th Cir. 1977).

The foreclosing of federal employment for three years based on an investigation by the civil service commission which stigmatized the reputation of the applicant throughout the federal system constituted "stigma plus" mandating a due process hearing. *Larry v. Lawler*, 605 F.2d 594 (7th Cir. 1978). However, the discharge of a teacher who because of her religious beliefs disregarded the prescribed curriculum was determined to have not

been a deprivation of her liberty interest. *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979).

In each instance the deprivation of liberty—stigma—was required to be coupled with some loss of a right, claim or entitlement. In *Colazzi*, and *Austin*, the stigma was coupled with discharge. In *Larry* the stigma was coupled with the foreclosure from eligibility for federal employment. In *Palmer* as in *Elbert* no claim right or entitlement was lost. *Palmer*'s religious freedom was not extinguished. Elbert's employment was continued and his reputation publicly cleared.

These consistent rulings of the Seventh Circuit in interpreting *Paul v. Davis* are in accordance with its letter and spirit. The inescapable conclusion is that Petitioner's allegations of confusion and prejudice to compel the granting of the Petition are unfounded. Hence, Petitioner's Writ for Certiorari should be denied.

CONCLUSION

The decisions of the courts below have consistently applied the principles of *Paul v. Davis* in accordance with the meaning, spirit and intent of the Civil Rights Act. The issues presented in this case do not warrant review by this Court. The issues are of little importance or impact.

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 6, 1981